A

BALAN SUBRAMANIAM PONNUDURAI

v.

PP & ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
CLEMENT SKINNER JCA
LINTON ALBERT JCA
[CRIMINAL APPEALS NO: A-05-280-2010 & A-05-372-2010]

C

27 JUNE 2013

CRIMINAL LAW: *Murder - Conviction and sentence - Appeal against - Whether trial judge erred in convicting appellant in reliance on first victim's dying declaration and inferences drawn from circumstantial*

D

evidence - Whether appellant responsible for outbreak of fire and injuries - Whether trial judge erred in admitting oral statement of first victim as dying declaration - Cross-appeal by prosecution - Whether trial judge erred in not admitting second victim's written statement recorded by police officer - Whether trial judge erred in not impeaching credit of third victim

E

EVIDENCE: *Statements - Admissibility of statement - Statements made by murder victims prior to death - Whether oral statement by first victim to doctor admissible - Whether dying declaration - Whether first victim lucid or mentally fit to make dying declaration - Whether doctor was*

F

independent witness - Admissibility of written statement by second victim to police officer - Whether statement dying declaration - Relevancy - Whether statements were relevant in establishing issues raised - Corroboration - Whether second victim's dying declaration corroborated first victim's dying declaration - Evidence Act 1950, s. 32(1)(a)

G

EVIDENCE: *Witness - Inconsistencies in evidence - Third victim's oral testimony in court contradicted statement recorded under s. 112 of Criminal Procedure Code in material particulars - Whether trial judge erred in not impeaching credit of witness*

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The outbreak of fire to a house in Batu Gajah ('the house') led to the death of two of the occupants of the house, namely one Angeladevi, the wife of the appellant ('the first victim'), and her daughter, Anuradha ('the second victim'). The third occupant of the house, the appellant's other daughter, Malini ('the third

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victim') sustained burn injuries on her forearms and left thigh. The

forensic team that carried out the investigation into the cause of the outbreak of the fire concluded that the cause was arson by use of petrol. A common thread in the testimonies of the appellant's neighbours was that when they came out of their respective homes after hearing the sound of a quarrel or screams, they saw a white Toyota car speeding away from the house but were unable to identify the driver. The neighbours further testified that the appellant was nowhere in sight when the murder victims came out of the burning house, their bodies ablaze. The third victim of the fire was trapped in the burning house and managed to save herself when one of the neighbours managed to break open a window in the room she was trapped in. According to the pathologist, the cause of death of the first victim was shock due to 90% burns, while the cause of death of the second victim was septicaemia with multi-organs failure resulting from 30% burn injuries. The appellant was charged with the murder of the first and second victim and the attempted murder of the third victim. Based on the statements made by the two murder victims prior to their death and the circumstantial evidence by inferences to be drawn from the proved facts by the evidence of the neighbours, the prosecution submitted that the appellant was responsible for causing the fire that led to the death of the two victims and the burn injuries sustained by the third victim. The third victim's oral testimony in court contradicted her statement recorded under s. 112 of the Criminal Pocedure Code ('CPC') in material particulars, so the prosecution was allowed to institute impeachment proceedings against her. However, the trial judge ruled that the third victim's credit was not impeached. At the end of the prosecution's case the trial judge found that the prosecution had failed to prove a *prima facie* case against the appellant in respect of the charge of murder of the second victim and the attempted murder of the third victim. However, in respect of the charge of murder of the first victim, the trial judge held that the prosecution had proven a *prima facie* case against the appellant and called upon him to enter his defence. After hearing the appellant's defence, which consisted of a series of denials, the appellant was found guilty, convicted and sentenced to death. This was the appellant's appeal against that conviction and sentence, and the prosecution's cross-appeal in respect of the appellant's acquittal to the charge of murder of the second victim and the attempted murder of the third victim. In his appeal, the appellant challenged the admissibility of the first victim's oral statement to

A the doctor attending to her as a dying declaration. It was the appellant's contention that the trial judge had erred in admitting this oral statement because of the lack of positive evidence adduced to show that the first victim was lucid or mentally fit to make such a dying declaration. In its cross-appeal, the prosecution
B submitted that the second victim's statement to the police officer ought to have been admitted as a dying declaration, as it had satisfied the requirements of s. 112 of the CPC and that the third victim's credit should have been impeached by reason of the major inconsistencies highlighted in the impeachment proceedings.

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Held (dismissing appellant's appeal and allowing prosecution's cross-appeal)

Per Zaleha Zahari JCA delivering the judgment of the court:

D **(1)** The best evidence to establish that the appellant was responsible for the outbreak of the fire to the house and the injuries sustained by the two victims that was sufficient to cause their deaths in the ordinary course of nature was the oral dying declaration of the first victim and the written dying declaration of the second victim. The oral statement by the
E first victim to her doctor was rightly admitted by the trial judge as a dying declaration under s. 32(1)(a) of the Evidence Act 1950 ('the EA'). The medical evidence showed that the first victim despite having sustained severe burn injuries was conscious, able to speak and lucid. Further, the doctor who
F attended to her was an independent witness with no reason to concoct such evidence. The first victim's statement that the appellant was the person who had set her on fire was material evidence. (paras 45, 46 & 48)

G **(2)** Similarly, the second victim's statement recorded by the police, which related the circumstances leading to the injuries that resulted in her death, ought to also have been admitted under s. 32(1)(a) of the EA. The trial judge had erred in not admitting this statement. The medical evidence showed that
H the second victim was fit to make the statement and that the recording officer had faithfully and truly recorded her statement. The second victim's dying declaration also corroborated the dying declaration of the first victim. In effect, the dying declarations of the two victims pointed to the

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appellant as being the person who poured petrol on both of them resulting in the outbreak of the fire to the house and their deaths. (paras 49, 50, 51 & 53)

(3) As for the third victim's evidence, the trial judge erred in not impeaching her credit as her testimony in court contradicted her s. 112 CPC statement in material particulars. (para 47)

(4) The trial judge had rightly inferred from the evidence of the appellant's neighbours that it was the appellant who had sped off in the white car at the time of the outbreak of the fire by reason of the appellant not being seen in the vicinity of the house when it was on fire. (para 52)

(5) As the facts of the three charges were intertwined and intrinsically connected as to form a part of the same transaction by reason of proximity of time, place, continuity of action and purpose, the trial judge had erred in ruling that the prosecution had not proved a *prima facie* case against the appellant for the two charges of attempted murder of the third victim and the murder of the second victim. In the circumstances, the prosecution's cross appeal should be allowed and the cases ought to be remitted back to the High Court for the appellant to enter his defence in respect to these two charges. (para 55)

Bahasa Malaysia *Translation Of Headnotes*

Kebakaran sebuah rumah di Batu Gajah ('rumah itu') menyebabkan kematian dua penghuni rumah itu, bernama Angeladevi, isteri perayu ('mangsa pertama') dan anak perempuannya, Anuradha ('mangsa kedua'). Penghuni ketiga rumah itu, seorang lagi anak perempuan perayu, Malini ('mangsa ketiga') mengalami kecederaan akibat kebakaran pada bahagian tangan dan peha kirinya. Ahli forensik yang menjalankan siasatan terhadap punca kebakaran tersebut menyimpulkan bahawa sebabnya adalah arson dengan menggunakan petrol. Jiran-jiran perayu memberi keterangan bahawa apabila mereka keluar dari rumah mereka masing-masing selepas mendengar bunyi pertengkaran, mereka telah melihat sebuah kereta Toyota berwarna putih memecut dari rumah itu tetapi gagal mengecam pemandunya. Jiran-jiran memberi keterangan bahawa perayu tidak kelihatan di mana-mana apabila mangsa pembunuhan keluar dari rumah dengan badan sedang dalam keadaan terbakar. Mangsa ketiga terperangkap dalam rumah yang terbakar itu dan berjaya menyelamatkan dirinya apabila salah seorang jiran memecah

A buka tingkap bilik di mana dia terperangkap. Menurut ahli patologi, sebab kematian mangsa pertama adalah kejutan disebabkan 90% kebakaran manakala sebab kematian mangsa kedua adalah "septicemia with multi-organs failure" disebabkan oleh 30% kecederaan akibat kebakaran. Perayu dituduh dengan pembunuhan B mangsa-mangsa pertama dan kedua dan percubaan untuk membunuh mangsa ketiga. Berdasarkan kenyataan-kenyataan yang dibuat oleh kedua-dua mangsa pembunuhan itu sebelum kematian mereka dan keterangan ikut keadaan oleh inferens yang disimpulkan daripada fakta-fakta terbukti oleh keterangan jiran-jiran, C pihak pendakwaan menghujah bahawa perayu bertanggungjawab atas kematian kedua-dua mangsa dan kecederaan akibat kebakaran yang dialami oleh mangsa ketiga. Keterangan lisan mangsa ketiga di mahkamah bercanggah dengan kenyataannya yang direkodkan di bawah s. 112 Kanun Tatacara Jenayah ('KTJ'), oleh itu pihak D pendakwaan dibenarkan memulakan prosiding pencabaran terhadap mangsa ketiga. Walau bagaimanapun, hakim bicara memutuskan bahawa kebolehpercayaan mangsa ketiga tidak dicabar. Pada akhir kes pihak pendakwaan, hakim bicara mendapati bahawa pihak pendakwaan gagal menbuktikan satu kes *prima facie* terhadap E perayu berkenaan tuduhan membunuh mangsa kedua dan percubaan membunuh mangsa ketiga. Walau bagaimanapun, berkenaan tuduhan membunuh mangsa pertama, hakim bicara memutuskan bahawa pihak pendakwaan telah membuktikan satu kes *prima facie* terhadap perayu dan memanggilnya untuk F memasukkan pembelaannya. Selepas mendengar pembelaan perayu, yang mengandungi penafian semata-mata, perayu didapati bersalah, disabitkan dan dihukum mati. Ini adalah rayuan perayu terhadap sabitan dan hukuman dan pihak pendakwaan pula telah membuat rayuan balas berkenaan pembebasan perayu bagi tuduhan G membunuh mangsa kedua dan percubaan membunuh mangsa ketiga. Dalam rayuannya, perayu mencabar kebolehterimaan kenyataan lisan mangsa pertama kepada doktor yang telah merawatnya sebagai pernyataan nazak. Adalah hujahan perayu bahawa hakim bicara khilaf dalam menerima kenyataan lisan ini H disebabkan kekurangan keterangan positif yang dikemukakan untuk menunjukkan bahawa mangsa pertama adalah waras untuk membuat pernyataan nazak sebegitu. Dalam rayuan balasnya, pihak pendakwaan menghujahkan bahawa kenyataan mangsa kedua kepada pegawai polis sepatutnya diterima masuk sebagai pernyataan nazak I memandangkan ia telah mematuhi kehendak s. 112 KTJ dan

bahawa kebolehpercayaan mangsa ketiga sepatutnya dicabar disebabkan percanggahan besar yang dikesan semasa prosiding pencabaran.

Diputuskan (menolak rayuan perayu; membenarkan rayuan silang pihak pendakwaan)
Oleh Zaleha Zahari HMR menyampaikan penghakiman mahkamah:

(1) Keterangan terbaik untuk membuktikan bahawa perayu bertanggungjawab bagi kebakaran rumah itu dan kecederaan yang dialami oleh kedua-dua mangsa mencukupi untuk menyebabkan kematian mereka dalam perjalanan semula jadi adalah pernyataan nazak lisan mangsa pertama dan pernyataan nazak bertulis mangsa kedua. Kenyataan lisan oleh mangsa pertama kepada doktornya telah diterima masuk secara betul oleh hakim bicara sebagai pernyataan nazak di bawah s. 32(1)(a) Akta Keterangan 1950 ('Akta'). Keterangan perubatan menunjukkan bahawa mangsa pertama, walaupun mengalami kecederaan teruk akibat kebakaran, sedar, boleh bercakap dan adalah waras. Tambahan, doktor yang telah merawatnya merupakan saksi bebas tanpa sebarang alasan untuk mereka keterangan sebegitu. Kenyataan mangsa pertama bahawa perayulah orang yang telah memulakan kebakaran terhadapnya merupakan keterangan material.

(2) Kenyataan mangsa kedua yang direkodkan oleh polis, berkenaan kecederaan yang menyebabkan kematiannya sepatutnya diterima masuk di bawah s. 32(1)(a) Akta. Hakim bicara khilaf dalam tidak menerima masuk kenyataan ini. Keterangan perubatan menunjukkan bahawa mangsa kedua layak membuat kenyataan dan bahawa pegawai rakaman telah merakamkan kenyataannya dengan jujur dan benar. Pernyataan nazak mangsa kedua juga menyokong pernyataan nazak mangsa pertama. Hakikatnya, pernyataan nazak kedua-dua mangsa menunjukkan perayu sebagai orang yang telah mencurahkan petrol ke atas mereka dan menyebabkan kebakaran kepada rumah itu dan kematian mereka.

(3) Bagi keterangan mangsa ketiga, hakim bicara khilaf dalam tidak mencabar kebolehpercayaannya memandangkan keterangannya di mahkamah bercanggah dengan kenyataan s. 112 dalam butir-butir material.

(4) Hakim bicara telah dengan betul menyimpulkan, daripada keterangan jiran-jiran perayu, bahawa perayulah yang telah memecut dalam kereta putih semasa kebakaran tersebut kerana perayu tidak berada di kawasan rumah itu semasa ia terbakar.

(5) Memandangkan ketiga-tiga pertuduhan mempunyai hubungan untuk membentuk satu transaksi sama disebabkan jarak masa, tempat, kesinambungan tindakan dan tujuan, hakim bicara khilaf dalam memutuskan bahawa pihak pendakwaan tidak membuktikan satu kes *prima facie* terhadap perayu bagi kedua-dua tuduhan percubaan untuk membunuh mangsa ketiga dan pembunuhan mangsa kedua. Dalam keadaan ini, rayuan balas pihak pendakwaan sepatutnya dibenarkan dan kes-kes ini dikembalikan ke Mahkamah Tinggi untuk perayu memasukkan pembelaannya berkenaan kedua-dua pertuduhan tersebut.

Legislation referred to:
Criminal Procedure Code, s. 112
Evidence Act 1950, s. 32(1)(a)

For the appellant - K Kumaraendran (Dev Kumar with him); M/s Kumar & Co
For the respondent - Awang Armadajaya Awang Mahmud; DPP

[Appeals from High Court, Ipoh; Criminal Trial No: 45-3-2005, 45-4-2005 & 45-5-2005]

Reported by Vani Krishnan

JUDGMENT

Zaleha Zahari JCA:

[1] The reasons why the appellant's appeal was dismissed and the Public Prosecutor's cross-appeal was allowed in this case were as follows.

[2] Three charges had been preferred against the appellant, ie, attempted murder of his daughter, Malini a/p Balansubramaniam (subsequently referred to as "Malini") murder of his wife, Angeladevi a/p Raman (subsequently referred to as "Angeladevi"); murder of another daughter, Anuradha a/p Balansubramaniam (subsequently referred to as "Anuradha"). The charges are reproduced for ease of reference.

(a) Criminal Trial No. 45-3-2005

Bahawa kamu pada 11 Oktober 2004, di antara jam lebih kurang pukul 10.00 malam hingga 11.00 malam di sebuah rumah No. 164, Desa Changkat (Indian Settlement), Batu Gajah, di dalam Daerah Kinta, di dalam Negeri Perak telah melakukan suatu perbuatan, iaitu menggunkan cecair kerosene bagi membakar, dengan niat dan dalam keadaan yang sedemikian bahawa jika, dengan perbuatan itu, kamu telah menyebabkan kematian Malini a/p Balansubramaniam, KPT No. 811217-08-6482, kamu didapati bersalah melakukan kesalahan membunuh orang dan bahawa kamu telah menyebabkan kecederaan kepada Malini a/p Balansubramaniam, dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum dibawah Seksyen 307 Kanun Keseksaan.

(b) Criminal Trial No. 45-4-2005

Bahawa kamu pada 11 Oktober 2004, di antara jam lebih kurang pukul 10.00 malam hingga 11.00 malam di sebuah rumah No. 164, Desa Changkat (Indian Settlement), Batu Gajah, di dalam Daerah Kinta, di dalam Negeri Perak telah melakukan pembunuhan dengan menyebabkan kematian Angeladevi a/p Raman, KPT No. 570226-08-5516 dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum dibawah Seksyen 302 Kanun Keseksaan.

(c) Criminal Trial No. 45-5-2005

Bahawa kamu pada 11 Oktober 2004, di antara jam lebih kurang pukul 10.00 malam hingga 11.00 malam di sebuah rumah No. 164, Desa Changkat (Indian Settlement), Batu Gajah, di dalam Daerah Kinta, di dalam Negeri Perak telah melakukan pembunuhan dengan menyebabkan kematian Anuradha a/p Balansubramaniam, KPT No. 840724-08-5460 dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum dibawah Seksyen 302 Kanun Keseksaan.

[3] Based on the evidence adduced by the prosecution the learned trial judge's findings at the end of the prosecution's case was that the prosecution had failed to prove a *prima facie* case against the appellant in respect of the charge of attempted murder of Malini and murder of Anuradha. The appellant was acquitted and discharged in respect of these two charges.

[4] However, in respect of the charge of murder of Angeladevi, the learned trial judge held that the prosecution had proved a *prima facie* case against the appellant and called upon him to enter his defence. After hearing the defence to this charge, the learned

trial judge held that the appellant had failed to raise a reasonable doubt in his favour, found him guilty, convicted him, then imposed the mandatory sentence of death upon him.

[5] The appellant's appeal against his conviction and sentence for murder of Angeladevi is the subject matter of Appeal No. A-05-280-2010. The prosecution's cross-appeal in respect of the appellant's acquittal to the charge of attempted murder of Malini and murder of Anuradha is the subject matter of Criminal Appeal No. A-05-372-2010.

[6] The determination of this appeal and cross-appeal essentially rests on the following issues: firstly, whether the learned trial judge was right in admitting the oral statement of Angeladevi to Dr Setow Hoo (PW21) as a dying declaration; secondly, whether the judge was right in not admitting Anuradha's s. 112 Criminal Procedure Code ('CPC') statement (ID60) recorded by ASP Zahiri bin Hassan (PW23) as evidence; lastly, whether the circumstantial evidence warranted the drawing of the inferences which the trial judge did?

The Evidence

[7] The charges preferred against the appellant arose out of the same incident, ie, the outbreak of fire to a semi-permanent house situated at No. 164, Desa Changkat (Indian Settlement) Batu Gajah, Kinta ("the said house"). The appellant and the victims named in the three charges, as well as the appellant's son, Krishnan a/l Balan Subramaniam (PW16) lived in the said house. The evidence established that the appellant's son, Krishnan, was not at home on the date and time specified in the charge.

[8] The fact that the said house was completely burnt down on the date and time specified in the three charges was not in issue. Mohamad Yamin bin Naib (PW10), the officer-in-charge of the Balai Bomba Penyelamat Batu Gajah, had carried out an investigation as to the cause of the fire to the said house arising from which Angeladevi and Anuradha (the persons named in the murder charges) and Malini (the person named in the attempted murder charge) had sustained the burn injuries as testified by the doctors who had attended to them. PW10's finding was that the cause of the fire was arson due to the burnt spots having the smell of combustible substance which however he could not identify.

[9] Supt Abdul Aziz bin Abdul Majid (PW12) and DSP Safani bin Mat Salleh (PW17) also carried out an investigation as to the cause of the fire to the said house. The source of the fire was traced to have started in the living room by reason of two burnt debris having traces of kerosene or petrol. The forensic team's conclusion was that the cause of the fire was due to fuel at the scene of the incident. According to the chemist, Kartigasu a/l Arumugam (PW7), one of the burnt debris sent to him for analysis by ASP Ng Bo Huat (PW9), the investigation officer (IO) in this case, was confirmed to have traces of petrol.

[10] It is not in issue that the persons named in the murder charges had died. Dr Mohamed Shafie b Othman @ Osman (PW24), the forensic pathologist who performed the post mortem on Angeladevi and Anuradha states that the cause of death of Angeladevi was shock due to 90% burns (exh. P39). PW24 was of the opinion that anyone suffering from 90% burns would in a normal situation be sufficient to cause death. As for Anuradha, the cause of her death was 'septicaemia with multi-organs failure resulting from 30% burn injuries' (exh. P40). PW24 was of the view that septicaemia with multi-organs failure resulting from 30% burn injuries was sufficient in a normal situation to cause death.

[11] As to who caused the outbreak of the fire to the said house due to arson by the use of petrol, arising from which the persons named in the charges suffered the burn injuries as described the doctors who had attended to them, leading to the death of two of them, the prosecution's case rests on direct evidence by way of the statements made by the two deceased persons, Angeladevi and Anuradha prior to their death, as well as circumstantial evidence by inferences to be drawn from the proved facts by the evidence of the neighbours.

[12] I propose to deal with the circumstantial evidence first before dealing with the direct evidence.

The Neighbour's Evidence

[13] A common thread ran through the evidence of the appellant's neighbours as to what happened that night, *inter alia*, Sinnapayen a/l Perumal (PW2), Hasmah bte Che Yin (PW5), Noraina Zainuddin (PW6), and Kartigesu a/l Arumugam (PW7).

[14] Upon hearing either the sound of a quarrel or screams, the appellant's neighbours went out of their respective homes and saw the appellant's house on fire. The fire department was notified. The neighbours rendered whatever assistance they could to contain the fire. These witnesses testified to seeing a car, a white Toyota, being driven off at some speed, pass the front of the appellant's house towards the direction of the main road. None of them could however identify the driver of the white Toyota which sped off that night, but such a car was normally used by the appellant. Without exception, all of the neighbours testified that the appellant was nowhere to be seen to help put out the fire to his burning house that night. Angeladevi, Malini and Anuradha was seen by these neighbours coming out of their burning house, their bodies, ablaze.

The Medical Evidence

[15] Angeladevi, Malini and Anuradha were initially sent to Batu Gajah Hospital, then to Ipoh General Hospital for treatment suffering from severe burn injuries as described by the doctors who had attended and treated them.

Angeladevi

[16] Dr Setow Hoo (PW21) testified to having attended to Angeladevi on 11 October 2004. Her condition was serious. Angeladevi sustained 80% full thickness burns to her whole face, entire anterial aspect of her chest and to both her arms and lower limbs. She had difficulty in breathing but was conscious.

[17] In his oral testimony in court PW21 testified that when he attended to Angeladevi she told him that her husband was the person who had set her on fire ("Beliau beritahu saya suami yang membakar dia"). PW21 made mention of such a statement being made to him by Angeladevi for the first time when he was giving evidence in court. This statement was not supported by any contemporaneous document.

[18] The learned trial judge admitted Angeladevi's oral statement to PW21 as a dying declaration under s. 32(1)(a) of the Evidence Act 1950 and gave due weight to this statement. This ruling was raised as a ground of appeal which will be dealt with subsequently in this judgment.

Anuradha

[19] Anuradha was attended by two doctors, Dr Setow Hoo (PW21) and Dr. Lim Kwang Yang (PW20). PW21 attended to Anuradha on 12 October 2004 between 12 midnight to 1 am. She sustained 30% mixed burns on her back and left upper limbs hand and was also in a serious condition upon admission.

[20] PW21 agreed in cross-examination that given the fact that the burn injuries sustained by Anuradha and the treatment she was given, it would have been difficult but not impossible for Anuradha to give a statement to the police while she was in the burn unit. Anuradha would have been unconscious at any one time and drifting in and out of consciousness while medication were administered to her.

[21] PW20 testified to having administered Anuradha with pethidine to sedate her which could cause drowsiness in view of the condition she was in. PW20 could not say for certain whether the patient was able to fully and normally converse with anyone. Anuradha died on 25 October 2004.

[22] To prove that the appellant was the person who poured petrol on his wife and daughter and setting them ablaze, the prosecution attempted to have ID60, Anuradha's statement recorded by ASP Zahiri bin Hassan (PW23) under s. 112 of the CPC admitted pursuant to s. 32 (1)(a) of the Evidence Act 1950 as an exhibit. ID60 was recorded on 12 October 2004 at 4am which took about 30-40 minutes to complete. Anuradha signed at the end of the statement, not every page. In ID60 Anuradha related what the appellant did and said, his threat to burn her and her mother, the lighting of a match, the burning of newspaper, then the pouring of petrol over her mother and her, resulting in the house being on fire, and her sustaining the serious burn injuries as described by the doctors arising from which she died. Exhibit (ID60) *inter alia* states as follows:

> 1. Pada 11.10.2004 lebih kurang pukul 7.00 petang semasa ini saya berada di rumah bersama kakak saya nama Malini dan emak saya nama Angeladavi. Semasa ini kami semua berada di ruang tamu dan bapa saya balik dalam keadaan mabuk, marah-marah dan bising-bising mengeluarkan kata-kata kotor seperti kamu bukan anak-anak saya tetapi anak-anak anjing.

2. Lebih kurang pukul 8.00 malam 11.10.2004 bapa saya balik semula ke rumah dan terus ke dapur melihat makanan. Tidak lama selepas itu bapa saya datang kepada saya yang sedang menonton televisyen di ruang tamu dengan nada marah menyatakan kepada saya hendak bakar emak saya.

3. Bapa saya berlalu sebentar dan apabila datang semula dalam masa, tidak sampai 2 minit saya nampak bapa saya ada memegang sehelai suratkhabar yang telah terbakar dan membuangnya di hujung kepala saya. Bapa saya juga sebenarnya semasa ini telah membawa satu jug aluminium saya syaki minyak petrol berdasarkan baunya dan terus mencurahkan ke atas badan emak saya menyebabkan api daripada suratkhabar yang menyala tadi menyambar dengan cepat muka, bahu, tangan dan kaki saya. Manakala emak saya pula api menyambar seluruh badannya. Saya bersama emak saya terus berlari keluar rumah dan diikuti oleh kakak saya juga dalam keadaan api membakar boleh dikatakan seluruh badannya. Jiran saya kemudiannya menghantar saya ke Hospital Batu Gajah manakala emak dan kakak saya juga dihantar ke Hospital Batu Gajah oleh jiran tetapi secara berasingan. Setelah itu kami dipindahkan unit rawatan lanjut ke Hospital Besar Ipoh.

4. Setelah membakar kami bertiga beliau terus keluar dengan motokarnya. Saya sendiri tidak tahu dimana beliau pergi atau berada sekarang.

[23] The learned trial judge ruled that it was unsafe to admit ID60 as an exhibit by reason of the absence of medical evidence confirming that Anuradha was in a fit condition to make such a statement. This ruling was the subject matter of the prosecution's cross-appeal and will be dealt with subsequently in this judgment.

Malini

[24] PW21 also testified to having attended to Malini that same day, 12 October 2004, at about 2.03am. Malini sustained burn injuries on her left and right forearm as well as left thigh. Malini was referred to PW20 that same day at about 9am.

[25] The prosecution had called Malini (PW15) to relate the events that night leading to the outbreak of the fire to the said house. Malini oral's testimony in court was neutral, she had her dinner then went to sleep. That nothing of any significance occurred between her father, mother nor her sister, Anuradha, that night. She was awakened by the screams of her mother and

sister, to seeing them ablaze, their living room on fire. She related her initial attempts to escape were futile. She was trapped in the burning house. She only managed to save herself by jumping out of a window which someone had managed to break open at the room where she was trapped in.

[26] Malini's oral testimony in court contradicted her statement recorded under s. 112 Criminal Procedure Code (CPC) in material particulars (exh. P54), in which statement she had related in great detail as to events and the conduct of the appellant and the cause of fire that had razed her home that night. The record shows that the trial judge had allowed the prosecution to institute impeachment proceedings against Malini by reason of the major inconsistencies highlighted by the prosecution. At the conclusion of the impeachment proceedings the trial judge's finding was that Malini's explanation were not acceptable. Subsequently, taking into consideration the evidence of Dr Setow Hoo (PW21), the learned judge's finding was that Malini might not have been fully aware of herself during or while her statement was being recorded. The judge then ruled that Malini's credit was not impeached but her evidence was unreliable and must be treated with caution.

[27] This ruling of the High Court was the subject matter of the cross-appeal by the prosecution and will be dealt with subsequently in this judgment.

The High Court Judge's Decision

[28] The learned trial judge in his judgment made the following finding of facts and inferences from the facts proven:

> 13.2.4 A very strong inference could be drawn from the evidence of the neighbours PW5-PW7 that it was the accused who drove his white Toyota KE and sped off from the front of his house which was then on fire to the main road although none of the witnesses actually saw who the driver was. Such a strong inference was drawn from the following evidence:
>
> (i) PW7 told the Court that the accused had two cars: one was a white Toyota KE and the other was the white Nissan. The white Toyota KE was driven by the accused and sometimes by his son Krishnan (PW16). The possibility of his son driving the Toyota KE on

A the night in question could be easily ruled out because on the night in question, the son was in Kuala Lumpur. The other car was a white Nissan driven by Malini (PW15).

(ii) PW5 told the Court when she and her husband came
B out of her house after hearing noises as if people were screaming she saw the accused's house on fire and a white Toyota with registration number CK6489 passing the front of the accused's house being driven at a speed towards the road. She knew that the said white
C Toyota was usually used by the accused although she did not see who the driver was in the night in question. PW5's evidence was supported by PW6's evidence that on the night in question when she heard some noises outside her house, she opened her house window and heard someone starting his car for a long
D time and the car sped off from the house …

[29] The trial judge carefully considered the objection raised by the defence to the admission of Angeladevi's oral statement to Dr Setow Hoo (PW21) that the appellant was the person who had
E burnt her as a dying declaration under s. 32(1)(a) of the Evidence Act 1950. The defence relied on the fact that Angeladevi's oral statement had not been recorded in any medical report; the fact that PW21 did not lodge a police report or give a statement to the police of such an oral statement being made to him; the fact
F that it was raised for the first time in court; the exact words uttered by Angeladevi were not before the court; the probability that Angeladevi was not making a conscious and voluntary statement given the medical condition she was then in.

G **[30]** The learned trial judge then ruled that the oral statement of Angeladevi to Dr Setow Hoo, "Beliau beritahu saya suami yang membakar dia", was admissible under s. 32(1)(a) of the Evidence Act 1950. The judge was satisfied that although Angeladevi's condition upon admission to hospital was serious as testified by
H the doctors who had attended to her, he was satisfied based on the medical evidence before him that Angeladevi was conscious and able to speak. He ruled that the exact words uttered by Angeladevi were before the court. The words uttered by Angeladevi identified the person who caused the fire arising from
I which she sustained the 90% burnt injuries arising from which she subsequently died. The judge accepted Dr Setow Hoo as an independent witness, that his testimony was free from falsehood

and concoction and there was no reason to disbelieve him. Further, there was no possible reason for Angeladevi to falsely accuse her own husband, the appellant.

[31] In respect of Anuradha's written statement (ID60), the judge ruled that the recording officer PW23 had complied with the requirements of s. 112 CPC, to having administered the caution, then recording the statement in a language understood by Anuradha; that the statement had been duly read back to her and she was given an opportunity to make any corrections, and the statement had been duly signed by her. Be that as it may, he ruled that it was unsafe for ID60 to be admitted in evidence as there was no medical certificate issued by the attending doctors stating that Anuradha was in a fit mental state to give such a statement.

[32] With the admission of the oral dying declaration of Angeladevi, and considering it together with the other circumstantial evidence before him, and subjecting them to the maximum evaluation test, the judge's finding was that it was the appellant who had poured petrol on Angeladevi and set her ablaze and had caused the extensive burn injuries to her arising from which she died. He then made a finding that the prosecution had proved that the death of Angeladevi was caused by the appellant. However, as regards Anuradha, his finding was that, with the exclusion of Anuradha's statement made under s. 112 CPC as a dying declaration, there was insufficient evidence to prove that her death was caused by the appellant. Similarly, with regard to Malini, he made a finding that there was also insufficient evidence to prove that it was the appellant who caused the burn injuries sustained by Malini.

[33] In considering the appellant's defence to the murder of Angeladevi, the learned trial judge's finding was that they were but a series of denials; denial of quarrelling with his wife, denial of pouring 'kerosene' on his wife and daughters, to lighting newspapers and throwing the lighted newspaper to them, as well as denial of driving off in his car after setting them ablaze. He then found the appellant guilty, convicted him then sentenced him as stated earlier on in this judgment.

The Appellant Counsel's Submissions

[34] The appellant's counsel submitted that the circumstantial evidence was weak. The evidence of the neighbours, PW2, PW4 and PW5, testified to seeing a white Toyota being driven off at a speed pass by the appellant's house, but according to counsel none of them could positively identify who was then driving the said car.

[35] On the prosecution's attempt to adduce direct evidence as to the cause of the fire through Malini (PW15) who has been subjected to impeachment proceedings, counsel submitted that the judge erred in not impeaching Malini's credit.

[36] As for Angeladevi's oral statement to PW21 that her husband (ie, the appellant) was the person who caused her to be on fire which was relied on by the prosecution as an oral dying declaration, he submitted that the judge erred in admitting Angeladevi's oral statement to PW21 as a dying declaration. There was no evidence as to Angeladevi's state of mind when she allegedly made this statements to PW21. According to counsel for the appellant the prosecution has to prove that a person who had sustained 90% burnt injuries and gasping for breath, was in a position to make such an oral statement. In the absence of some positive evidence that Angeladevi was mentally fit to make the oral statement, of which he submitted there was none, it was his submission that the court erred in making the ruling which it did as Angeladevi could not have been lucid at the time when that statement was made. Counsel further submitted that such an oral statement should also not be accepted as it was not supported by any contemporaneous document. PW21 had not lodged a police report or give a statement to the police regarding this oral declaration. It should not have been accepted as the exact words uttered by Angeladevi had not been recorded.

[37] The appellant's counsel submitted the learned JC was right in not admitting Anuradha's s. 112 CPC statement (ID60) as evidence for the reasons given by him, and there was no medical evidence to support that she was fit to make such a statement.

The Deputy Public Prosecutors Submissions

[38] On Malini's testimony, he submitted that Malini's credit should have impeached by reason of the major inconsistencies highlighted in the impeachment proceedings.

[39] On the admission of Angeladevi's oral statement to PW21 as a dying declaration, he submitted that the trial judge was right in admitting Angeladevi's oral statement to PW21 as a dying declaration. Angeladevi made the oral to PW21 soon after her admission to the hospital. PW21, a professional, was a credible witness. PW21 personally heard Angeladevi's statement. There was no reason for PW21 to concoct such evidence.

[40] As for Anuradha's statement ID60, it must necessarily be considered at the admissibility stage, then, weighed. In this case the trial judge was satisfied that requirements of s. 112 CPC had been complied with. PW23 had recorded Anuradha's statement *verbatim*. Anuradha's statement corroborated the oral dying declaration of her mother Angeladevi, that the appellant was the person who had set her on fire, as well as the evidence of the neighbours. These evidence when considered as a whole lend credence to Anuradha's statement.

[41] The DPP submitted that on the facts of this case the person who poured petrol on Angeladevi must be the same person who committed the same act to Anuradha, resulting in her death and seriously injuring Malini.

Decision

[42] The cause of the fire to the said house has been confirmed to be arson by the use of petrol.

[43] It has been proved as a fact that the persons named in the murder charges had died from the burn injuries suffered by them when their home, the said house, was gutted and razed to the ground by the outbreak of fire that night.

[44] It has also been proved as a fact that the person named in the attempted murder charge had sustained burn injuries. Having been trapped in her burning house, Malini was lucky to have escaped the inferno due to the quick action of one of the neighbours breaking open a window of the room she was trapped in. Malini, fortunately, did not succumb to the burn injuries sustained by her.

[45] The critical questions to be answered are: has the prosecution proved that the appellant was the person responsible for the outbreak of the fire to the said house that night? If the

answer to this question was 'yes', whether it was committed with the intention to inflict bodily injury to the persons named in the murder charges and attempted murder charge? If the appellant was the person who was the cause of the fire, was it accidental or unintentional? Has it been proved that the injuries sustained by the named victims was sufficient to cause death in the ordinary course of nature?

[46] On these issues the best evidence would certainly be that of the victim themselves, by way of direct evidence, ie, the oral dying declaration of Angeladevi and written dying declaration of Anuradha.

[47] As for Malini's evidence we take the view that the trial judge erred in not impeaching Malini's credit as her testimony in court contradicted her s. 112 CPC statement in material particulars.

[48] In our considered opinion the statement made by Angeladevi to PW21 was rightly admitted by the trial judge as a dying declaration under s. 32(1)(a) of the Evidence Act 1950. The medical evidence shows that Angeladevi, despite sustaining the severe burn injuries which she did, was conscious, able to speak to the doctors who had attended to her and lucid enough to make the dying declaration which she did. We are in agreement with the learned trial judge that PW21 was an independent witness who had no reason to concoct such evidence. What Angeladevi told PW21, that her husband (ie, the appellant) was the person who had set her on fire, was certainly material evidence as it relates to the circumstances how she sustained the burn injuries which she did, arising from which she subsequently died.

[49] In respect of the non-admission of Anuradha's statement (ID60) recorded by PW23 as evidence, we are of the view that the trial judge had erred in doing so. We are of the view that ID60 should have been admitted as a dying declaration under s. 32(1)(a) Evidence Act 1950 and marked as an exhibit as it relates to the cause of Anuradha's death or circumstances of the transaction which resulted in her death.

[50] We are not in agreement with the judge's ruling that there was no positive evidence to show that Anuradha was fit to make the statement which she did. On the contrary, we take the view that the medical evidence shows that, despite the seriousness of

her burn injuries, Anuradha was fit to make the statement which she did. The recording officer (PW23) had faithfully and truly recorded Anuradha's statement, which statement was clearly relevant evidence as it relates to the circumstances leading to Anuradha's injuries which led to her death. The only issue being, what weight was to be accorded to it?

[51] In the circumstances of this case we take the view that there was no reason for us to doubt that the statements contained in ID60 to be genuine and true, that nothing can detract from its value. The dying declaration of Anuradha clearly corroborates the dying declaration of Angeladevi which has been rightly admitted by the trial judge.

[52] The direct evidence of the neighbours of a quarrel between the appellant and his wife and children just before the fire broke out was certainly also a relevant fact. We agree with the inferences made by the learned judge from the evidence of the neighbours, that it was the appellant who drove the white car that sped off from the front of the said house to the main road by reason of the appellant not being seen in the vicinity of the said house which was then on fire.

[53] The direct and circumstantial evidence adduced by the prosecution clearly proved that the appellant had the intention of causing bodily harm to Angeladevi and Anuradha by setting them ablaze and the bodily injury intended to be inflicted upon them was sufficient in the ordinary course of nature to cause death. The dying declarations of Angeladevi and Anuradha point to the appellant, and only him, being the person who had poured petrol on both of them, resulting in the outbreak of the fire to the said house that night, causing the death of his wife, Angeladevi, and daughter, Anuradha. His daughter Malini was lucky to survive due to the quick action of his neighbours and medical treatment given.

Conclusion

[54] For the above reasons we find that the prosecution had proved its case for the murder of Angeladevi beyond reasonable doubt. The appellant's appeal against his conviction and sentence for the murder of Angeladevi and sentence imposed upon him by the High Court was accordingly dismissed.

[55] In respect of the Public Prosecutor's cross-appeal against the acquittal of the appellant in respect of the charge of attempted murder of his daughter Malini and murder of his daughter Anuradha, as the facts of the three charges preferred against the appellant were intertwined and intrinsically connected as to form a part of the same transaction by reason of proximity of time, place, continuity of action and purpose, it is our finding that the learned judge had erred in ruling that the prosecution had not proved a *prima facie* case against him for the attempted murder of Malini and murder of Anuradha. The Public Prosecutor's cross appeal against this decision was allowed and accordingly set aside. These cases were remitted back to High Court Ipoh for the appellant to enter his defence in respect of these two charges.